In the Supreme Court of the United States

October Term 1976
No. 76-918

TRIUMPH HOSIERY MILLS, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal From the Supreme Court of Pennsylvania.

JURISDICTIONAL STATEMENT

HARRY J. RUBIN
KREKSTEIN RUBIN AND LASDAY
Counsel for Appellant

222 Pine Street
P. O. Box 799
Harrisburg, PA 17108

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

IN THE SUPREME COURT
OF THE UNITED STATES

October Term 1976
No.——

TRIUMPH HOSIERY MILLS, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal from the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Pennsylvania entered on October 8, 1976, affirming the judgment of the Commonwealth Court of Pennsylvania and submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that the questions are substantial.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is reported in —— Pa. ——, 364 A.2d 919. The opinion of the Commonwealth Court of Pennsylvania is reported in 21 Pa. Commonwealth Ct. 186, 343 A.2d 710. A copy of the opinion of the Supreme Court of Pennsylvania is attached hereto as Appendix A.

JURISDICTION

This suit was brought to contest the assessment against Appellant of Pennsylvania corporate net income tax pursuant to the provisions of Article IV of the Pennsylvania Tax Reform Code of 1971. Appellant contends that, to the extent Article IV requires a taxpayer to increase the amount of its taxable income apportioned to Pennsylvania by an amount equal to the corporate net income tax itself, *without apportionment*, Article IV violates the commerce, equal protection and due process clauses of the United States Constitution.

The judgment of the Supreme Court of Pennsylvania was entered on October 8, 1976. A notice of appeal was filed in the Commonwealth Court of Pennsylvania (the court possessed of the record) on December 2, 1976. The jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. §1257(2) and §2101(c). The following cases sustain the jurisdiction of the Supreme Court of the United States to review the judgment on direct appeal in this case: *General Motors v. Washington et al.*, 377 U.S. 436; *Standard Pressed Steel Co. v. Washington Department of Revenue*, 419 U.S. 560; *Colonial Pipeline Company v. Traigle*, 421 U.S. 1.

The relevant provisions of §401 and §402 of Article IV of the Pennsylvania Tax Reform Code of 1971, Act of March 4, 1971, Pamphlet Laws 6, as amended by the Act of September 9, 1971, Pamphlet Laws 437, 72 Pa. Stat. Ann. §§7401 and 7402, are set forth in Appendix B

hereto. The remaining sections of Article IV, containing administrative provisions, are not relevant to this appeal and have been omitted.

QUESTIONS PRESENTED

As interpreted by the Supreme Court of Pennsylvania, Article IV of the Pennsylvania Tax Reform Code of 1971, imposing a tax on a corporation for the privilege of doing business in Pennsylvania and measured by the net income of the taxpayer, requires the taxpayer to add back to its otherwise apportioned (to Pennsylvania) income an amount equal to the deduction for the corporate net income tax taken by the taxpayer on its federal income tax return and to include that added-back amount of tax *without apportionment* in its income actually taxed by Pennsylvania. As so interpreted, does the Pennsylvania statute violate:

1. The commerce clause (Art. 1, §8, cl. 3) of the Federal Constitution by subjecting Appellant to a risk of multiple taxation?

2. The due process clause of the Fourteenth Amendment to the Federal Constitution by subjecting Appellant to a capricious exercise of Pennsylvania's taxing power bearing no relation to the proper proportion of Appellant's activities carried on within Pennsylvania?

3. The equal protection clause of the Fourteenth Amendment to the United States Constitution by (A) taxing a corporation which does not transact all of its business in Pennsylvania (a multistate corporation) on a greater proportion of its net income relative to its activity in Pennsylvania than it does a

corporation which does transact all of its business in Pennsylvania and (B) taxing a greater and greater proportion of such net income of a multistate corporation as the activity in Pennsylvania becomes less and less?

STATEMENT OF THE CASE

Appellant is a New York corporation qualified to do business in Pennsylvania as a foreign corporation. It is subject to the provisions of the Pennsylvania Tax Reform Code of 1971, Article IV, imposing a tax for the privilege of doing business in Pennsylvania upon both domestic and foreign corporations. This tax is measured, in the first instance, by the amount of federal taxable income reported by a taxpayer to the federal government. However, the amount of federal taxable income is subject (1) to several special adjustments to reflect certain policies adopted by the Pennsylvania legislature and (2) to apportionment to reflect constitutional requirements regarding the extent of a state's power to impose its tax upon a corporation doing business in more than one state.

Appellant duly filed its 1971 Pennsylvania corporate net income tax report. It computed its tax as follows:

Federal taxable income	$1,835,971.00
Less: dividends received from other corporations (a special Pennsylvania adjustment)	200.00
	$1,835,771.00
Add: Pennsylvania corporate net income tax	151,281.00

Income to be apportioned	$1,987,052.00
Apportionment percentage	.642831
Pennsylvania taxable income	1,277,338.00
Tax at 12%	$ 153,280.56

Pennsylvania's taxing officials, however, disagreed with this computation and assessed tax as follows:

Federal taxable income	$1,835,971.00
Less: dividends received from other corporations	200.00
	$1,835,771.00
Apportionment percentage	.642831
Income apportioned to Pennsylvania	$1,180,090.58
Add: Pennsylvania Corporate Net Income Tax	151,281.00
Pennsylvania taxable income	$1,331,371.50
Tax at 12%	$ 159,764.58

As these contrasting computations clearly reveal, the only dispute between the parties is whether the amount of the Pennsylvania corporate net income tax is to be added back to income *before* or *after* the proper apportionment percentage is applied. The Pennsylvania statute, §§401 (3) 1, clearly requires a taxpayer to adjust its federal taxable income by adding back the amount of the Pennsylvania corporate net income tax taken by it as a deduction (pursuant to Internal Revenue Code §164) in computing its federal taxable income. However, the statute was ambiguous as to whether this add-back was to occur before or after a taxpayer applied its apportionment percentage to its income. Appellant argued that the add-back was to occur prior to apportionment; the Commonwealth argued that it was to occur after apportionment so that the added-back amount of tax was, in fact, to be taxed at 100%.

Appellant properly pursued its administrative remedies to contest the assessment in the manner provided by the Pennsylvania Tax Reform Code of 1971 and the Pennsylvania Act of April 9, 1929, Pamphlet Laws 343, §§1102 and 1103 (The Fiscal Code), 72 Pa. Stat. Ann. §§1102 and 1103. Following denials of its petition, it properly filed an appeal to the Commonwealth Court of Pennsylvania pursuant to §1104 of The Fiscal Code, 72 Pa. Stat. Ann. §1104. It raised the statutory issue noted above as well as the various constitutional issues referred to in this statement.

The case was tried and argued on a record consisting of an agreed stipulation of facts. Following the submission of briefs and oral argument at which these issues were presented to the Commonwealth Court, that court rejected all of Appellant's arguments and ruled in favor of Pennsylvania. With respect to the constitutional issues, that court's opinion states:

> ". . . appellant also raises a multifaceted constitutional objection to the statute as so construed. Citing the uniformity clause of the Pennsylvania Constitution, and the federal equal protection, due process and commerce clauses, appellant contends that a denial of apportionment, even as to only a single

component of the statutorily defined tax base, renders the Pennsylvania corporate net income tax constitutionally infirm."

Appellant then filed exceptions to the Commonwealth Court's order nisi. These exceptions were overruled by that court which entered a brief final order in favor of Pennsylvania without further discussion of the issues.

Appellant properly filed an appeal to the Supreme Court of Pennsylvania. In briefs and oral argument before that Court, it (and several amici curiae) again raised both the statutory and constitutional issues presented below. The Pennsylvania Supreme Court also rejected all of these arguments. For the purpose of this statement, that Court's interpretation of the Pennsylvania statute is final and definitive; and, since it held that the Pennsylvania statute requires the tax to be added back to income *after* apportionment, the constitutional issues squarely remained for consideration.

In this respect the opinion of the court below is curiously cryptic. Although all constitutional issues were fully presented to it, the Pennsylvania Supreme Court engaged in only limited discussion of these issues. After pointing out that

> "Apportionment is a necessary incident of the state's taxation of a multistate corporation."

that court went on to state as follows:

> ". . . Obviously, those elements of a foreign corporation's tax base which are fairly allocable to the taxing state without apportionment need not be apportioned prior to imposition of the tax. The federal tax deduction 'add-back' is such an element. It represents only the corporate net income taxes due on the *portion* of 'taxable income' related to business activity in *Pennsylvania.* In short, it is but a percentage of Pennsylvania income. Every corporation transacting business in the Commonwealth may be taxed on 100% of this localized element of the tax base. . . ." —— Pa. ——, 364 A.2d 919, 922.

Thus, the Supreme Court of Pennsylvania held that no apportionment of the added-back tax was necessary to comply with constitutional standards and, in so doing, rejected Appellant's claim to the contrary. While the opinion of that Court is not expansive on these issues, the above-quoted language does reflect a position fully covering all constitutional considerations.

THE QUESTIONS ARE SUBSTANTIAL

State taxes imposed upon or measured by net income are a ubiquitous feature of state taxation in this country. Forty-six states impose such taxes.[1] Thirty-four of these states use federal taxable income as the starting point in computing tax. Of these, only six—Connecticut, Hawaii, Nebraska, New Mexico, Ohio and Vermont—make no adjustment to federal taxable income with respect to the deduction for state income taxes taken on the federal return.

The twenty-eight remaining states who do restore the state tax(es) in some way do so as follows:

1. Nine states require an add-back of their own income tax *before* apportionment. They are: Colorado, Delaware, Florida, Illinois, Iowa, New Jersey, New York, Rhode Island and Tennessee.

Eighteen require an add-back of all state income taxes *before* apportionment. They are: Alaska, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, New Hampshire, North Carolina, North Dakota, Oklahoma, Virginia and West Virginia.

One—Pennsylvania—requires an add-back of its own income tax *without* apportionment.

---

[1] Commerce Clearing House, Inc., *State Tax Guide* (2nd Ed.), All States Statute Summaries 1042.

Appellant does not question the adjustment of federal taxable income by adding back the deducted amount of state income tax(es). What it has questioned— and questions here—is the inclusion of the amount so added back in the Pennsylvania taxable income without allowing it to be apportioned in the same manner as the rest of Appellant's income.

The validity of Pennsylvania's action has been questioned by Appellant under the commerce clause of Article 1, section 8, of the Federal Constitution and the due process and equal protection clauses of the Fourteenth Amendment. The Commonwealth Court of Pennsylvania ruled against Appellant by holding that no apportionment of the added-back amount was necessary because, as it stated, the tax "has been localized" and is not constitutionally required to be apportioned. 21 Pa. Commonwealth Ct. 186, 192, 343 A.2d 710, 714.

The Supreme Court of Pennsylvania essentially said the same thing. It disposed of these serious constitutional considerations in the following few sentences:

> ". . . Obviously, these elements of a foreign corporation's tax base which are fairly allocable to the taxing state without apportionment need not be apportioned prior to imposition of the tax. The federal tax deduction 'add-back' is such an element. It represents only the corporate net income taxes due on the *portion* of 'taxable income' related to business activity in *Pennsylvania*. In short, it is but a percentage of Pennsylvania income. Every corporation transacting business in the Commonwealth may be taxed on 100% of this localized element of the tax base. . . ." —— Pa. ——, 364 A.2d 919, 922.

While it is unfortunate that neither Pennsylvania court made an effort to review the relevant decisions of the Supreme Court on the issue of apportionment, the thrust of the statements made in the lower courts is an echo of what the Supreme Court has said. However, it is no more than that; and it seriously misconceives the constitutional necessities in this sensitive area.

2. The essential rule is that a state may impose a tax upon net (taxable) income as long as it permits this income to be fairly apportioned to business activities within the taxing state. *Northwestern States Portland Cement Company v. Minnesota, Williams v. Stockham Valves and Fittings,* 358 U.S. 450. The Supreme Court has applied the same rule to taxes upon or measured by gross receipts or gross income. *General Motors v. Washington,* 377 U.S. 436. *Standard Pressed Steel Co. v. Washington Revenue Dept.,* 419 U.S. 560.

In the latter—gross receipt cases—but not the former—net income cases—the Supreme Court has sustained imposition of Washington's tax measured by the unapportioned gross receipts realized from sales to customers located in Washington. In the context of those cases it held that the specific identification of a "local" Washington tax base—the receipts realized from sales or deliveries in the state—was a sufficient apportionment to Washington to sustain the tax against constitutional attack. No similar decision exists with respect to the taxation of net income.

The Pennsylvania courts apparently had these gross receipts tax cases in mind when they described the Pennsylvania tax itself as a "localized element" of the tax

base, and they apparently equated the tax here with the receipts in those cases. However, the difference between the two is so vast and the consequences so serious that major constitutional error results.

3. The Pennsylvania tax is a net income tax, not a gross receipts or gross income tax. Therefore, the requirement of apportionment is absolute unless a specific element of net income can be isolated. This is not impossible, of course. Under the Uniform Division of Income for Tax Purposes Act (UDITPA) many states, including Pennsylvania, have incorporated into their apportionment rules specific (and 100%) apportionment of certain types of net income—e.g., net gain from the sale of nonbusiness real property located within the state—which can be specifically identified with the state.

No state except Pennsylvania, however, has attempted to isolate a specific business deduction, such as a state tax, and subject it to specific apportionment. The mere fact that it is a Pennsylvania tax does not detract from its nonspecific identification as the end product of general, otherwise apportioned, business income earned everywhere, not just in Pennsylvania. See *Commonwealth of Virginia v. Olin Corporation,* 212 Va. 53, 181 S.E. 2d 818.

If Pennsylvania can isolate a business expense in this fashion, what then would prevent it (or any other state) from attempting to fragment every element of net income similarly and, after applying a localized description to it, impose tax on an unapportioned (100%) basis? Thus, a state could isolate the wages deduction paid to its employees within the state and require the amount of such wages to be added back to income without apportionment.

It could do the same with respect to advertising expense incurred in the state, with depreciation on property located within the state, with office expenses for maintenance of an office within the state, and so on.

It is not, however, the adjustment to income which is wrong; it is the adjustment *without apportionment*. Only by apportionment can a fair share of the business income be subjected to tax; and, since business deductions such as taxes are simply elements in computing net (taxable) business income, subjecting them to tax without apportionment exposes a taxpayer both to a substantial risk of multiple taxation and to a burden of tax unrelated to the activities within the taxing state.

Thus, since other states may constitutionally require that all state taxes be added back to federal taxable income before apportionment—as eighteen of them presently do—Pennsylvania's corporate net income tax is includible in the income subject to tax by these states. Since, at the same time, Pennsylvania requires its own tax to be added back without apportionment (i.e. taxed 100%), the income represented by the disallowance of this tax deduction is subjected to a multiple burden of taxation. If Pennsylvania's scheme of taxation is sustained, therefore, every state tax would be taxed in excess of 100% regardless of the multistate nature of the taxpayer's business and regardless of the extent of its activities in a state.

All of this is easily avoidable, of course, if adjustments to income such as a tax addback are made prior to apportionment. Then, only a fairly apportioned share of the taxpayer's income reasonably related to what the taxpayer does in the state will be subjected to tax. The unique nature of Pennsylvania's attempt to increase its tax base here should not be allowed to disguise the extremely mischievous nature of what has been done and its potentially harmful impact on multistate activities. The Supreme Court's decisions, cited above, at least should stand firmly for the requirement that net income must be fairly apportioned and that a business deduction used in computing net income is a part of the apportionable tax base, not a "localized element" of it.

4. Assuming, however, for argument's sake, that the Pennsylvania courts were correct in identifying the Pennsylvania tax deduction as a "localized element" of income, the Supreme Court will surely recognize the constitutional problems which follow. If a state's income tax is a local element of income subject to tax without apportionment, then taxes paid to other states are equally local elements of income assignable entirely to those states—and not at all to the taxing state. The ruling of the Supreme Court of Pennsylvania thus opens to serious question the statutes of those eighteen states which require taxes paid to other states to be added back to taxable income and included in the income subject to tax. If each state's tax is a "local" element of income, this cannot be done.

5. Finally, this strange Pennsylvania adjustment causes an equally strange discrimination to occur. For a corporation which does business only in Pennsylvania, there obviously is no problem. Apportionment is not a factor because all income, adjusted or not, is taxable by only one state. Put another way the apportionment factor of such a corporation is 100%.

For a multistate corporation, however, the situation is quite different. By definition, it does less than 100% of its business in a single state; and constitutional standards require that less than 100% of its general business income be subjected to tax by any single state. To accomplish this, various acceptable formulae have been developed, the most prevalent of which is the three-factor (property, wages, sales) formula. In theory, a formula should cause an exact apportionment of income to a taxing state; in practice, perfection is rarely achieved. However, a reasonable correlation between activity within a state and income apportioned to that state is sufficient; and it is to be expected only that such a reasonable correlation will occur.

This does not happen under Pennsylvania's unusual apportionment. While, as stated above, a corporation doing all of its business in Pennsylvania is not disadvantaged by the tax add-back, a multistate corporation finds itself apportioning relatively more and more of its income to Pennsylvania as it does less and less business here. A few examples will illustrate this point. Assume several corporations have $100,000 in Federal taxable income after deducting $10,000 in Pennsylvania tax. Assume, also, that these corporations respectively do 100%, 60% and 10% of their business in Pennsylvania.

The first—100%—corporation will add back the tax and pay Pennsylvania on the basis of $110,000 in taxable income.

The second—60%—corporation, which, it would seem, should have $66,000 of Pennsylvania taxable income ($100,000 plus $10,000 times 60% equals $66,000) instead, according to Pennsylvania, has $70,000 in taxable income ($100,000 times 60% equals $60,000 plus $10,000 equals $70,000).

The third—10%—corporation, which, it would seem, should have $11,000 in Pennsylvania taxable income ($100,000 plus $10,000 times 10% equals $11,000) instead, according to Pennsylvania, has $20,000 in taxable income ($100,000 times 10% equals $10,000 plus $10,000 equals $20,000).

Thus, the first corporation does 100% of its business in Pennsylvania and pays tax upon 100% of its income. The second does 60% of it its business in Pennsylvania and pays tax upon 63.63% of its income ($70,000 taxable income out of a total income of $110,000). The third does 10% of its business in Pennsylvania and pays tax upon 18.18% (almost twice the business level) of its income ($20,000 taxable income out of a total income of $110,000).

The extent of this phenomenon will vary, of course, depending upon the amount of federal taxable income and the amount of the Pennsylvania tax deducted in computing federal taxable income. The impact may be greater or less than illustrated cases. However, the principle never changes. *A multistate corporation pays tax upon more of its income relative to a corporation doing business only in Pennsylvania; and, as a secondary, even more discriminatory, feature of this principle, the disparity worsens as the multistate corporation does less business in Pennsylvania.*

This type of discrimination against multistate corporations not only involves the type of discrimination against interstate commerce rejected by the Supreme Court and already discussed above, it also involves a violation of the Equal Protection clause. By burdening multistate corporations more heavily than non-multistate corporations, Pennsylvania has placed the former at a relative and serious disadvantage in the market place. While states are substantially free to effect classifications between taxpayers, *Austin v. New Hampshire,* 420 U.S. 656, the distinction must be reasonable and not arbitrary. *Kahn v. Shevin,* 416 U.S. 351.

It is hard, actually impossible, to discern any reasonable distinction between general business corporations carrying on general business activity in Pennsylvania based upon the isolated fact that some do all of their business in that state and others do not. Yet, Pennsylvania has done just that; and, in so doing, Appellant submits, it has transgressed the equal protection standards established by the Supreme Court.

The judgment and opinion of the Supreme Court of Pennsylvania fails to recognize any of these constitutional infirmities in Pennsylvania's statute. Because the implications of the problems created by the statute have a national impact, both upon the thousands of multistate corporations paying income tax to Pennsylvania and upon all of the other states which impose income taxes upon corporations and because of the importance of maintaining the constitutional standards established by the Supreme Court in the state tax field, Appellant believes the

questions presented by this appeal are substantial, are of public importance and should receive plenary consideration.

Respectfully submitted,

HARRY J. RUBIN
KREKSTEIN RUBIN AND LASDAY
P. O. Box 739
Harrisburg, Pa. 17108
Counsel for Appellant

APPENDIX A

OPINION OF THE SUPREME COURT OF PENNSYLVANIA [364 A.2d 919]

JONES, C. J., Filed: October 8, 1976.

The Pennsylvania corporate net income tax, Act of March 4, 1971, P.L. 74, No. 2, art. IV, §401 *et seq., as amended,* 72 P.S. §7401 *et seq.,* is imposed on corporations transacting business within the Commonwealth. It is levied for the privilege of doing business in Pennsylvania. *Turco Paint & Varnish Co. v. Kalodner,* 320 Pa. 421, 184 A. 37 (1936). The tax base, called "taxable income," for computation of the tax is, essentially, federal taxable income to which the taxpayer "adds-back" any deduction for the Pennsylvania corporate net income tax taken on the federal return. Section 401 (3) 1 of the Act, *supra,* 72 P.S. §7401 (3) 1. Corporations transacting their entire business in the Commonwealth apply the tax rate to all their "taxable income," while those which are not purely local are taxed on only the portion of "taxable income" attributable to the state. This latter figure is determined through application of an apportionment percentage. Section 401 (3) 1, 2, *supra,* 72 P.S. §7401 (3) 1, 2. In this appeal we are asked to decide whether a corporation whose entire business is not transacted in Pennsylvania may apportion that part of its tax base which represents the corporation's federal tax deduction for the Pennsylvania corporate net income tax.

The appeal is before us on an agreed stipulation of facts. Appellant, Triumph Hosiery Mills, Inc., is a New York corporation authorized to do business in Pennsylvania. During 1971 it engaged in business activity in Pennsylvania and was liable for Pennsylvania corporate net income tax. In its tax report for that year, appellant arrived at its tax base by adding to federal taxable income the amount of Pennsylvania corporate net income tax deducted on its federal income tax return. Appellant then apportioned the sum of these two items.

This computation was disputed by the Pennsylvania Department of Revenue and Department of the Auditor General. The two departments first applied appellant's apportionment percentage to federal taxable income. Then, the whole deduction for Pennsylvania corporate net income tax was "added-back" in order to arrive at "taxable income." The method employed by the Commonwealth yielded $6,484.02 more in taxes.

Thereafter, appellant filed a Petition for Resettlement which was refused. It then filed a Petition for Review with the Board of Finance and Revenue which was also refused, two members of the Board dissenting. On appeal to the Commonwealth Court appellant was again denied relief. This appeal followed.

Section 401 (3) of the taxing statute provides:

> " 'Taxable income.'
>
> 1. In case the entire business of the corporation is transacted within this Commonwealth, for any taxable year which begins on or after January 1, 1971, taxable income for the calendar year or fis-

cal year as returned to and ascertained by the Federal Government. . . . In arriving at 'taxable income' for Federal tax purposes for any taxable year beginning on or after January 1, 1971, any corporate net income tax due to the Commonwealth pursuant to the provisions of this article shall not be allowed as a deduction and the amount of corporate net income tax so due and excluded from Federal taxable income under the Internal Revenue Code *shall not be apportioned* but shall be subject to tax at the rate imposed under this article.

2. In case the entire business of any corporation . . . is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income of such corporation for the fiscal or calendar year, *as defined in subclause 1 hereof*. . . ." (Emphasis supplied.)

This statute, like every enactment of the legislature, must be analyzed in accordance with the established rules of statutory construction. Particularly pertinent to the determination at hand is the principle "that a taxing statute must be strictly construed and any doubt or uncertainty as to the imposition of a tax must be resolved in favor of the taxpayer." *Commonwealth v. Rieck Investment Corp.*, 419 Pa. 52, 59, 213 A.2d 277, 281-82 (1965); Statutory Construction Act of November 25, 1970, P.L. 707, added December 6, 1972, P.L. 1339, §3, 1 Pa.C.S. §1928(b)(3). Of equal importance is the presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." Statutory Construction Act, *supra*, 1 Pa.C.S. §1922(1).

All the language of a statute must be given effect. "The Legislature cannot be deemed to intend that its language be superfluous and without import." *Daly v. Hemphill*, 411 Pa. 263, 273, 191 A.2d 835, 842 (1963). Additionally, it is mandatory, where possible, that we construe conflicting general and special provisions of a statute so that both may be given effect. Statutory Construction Act, *supra*, 1 Pa.C.S. §1933; *Appeal of Yerger*, Pa. , 333 A.2d 902 (1975); *Duquesne Light Co. v. Borough of Monroeville*, 449 Pa. 573, 298 A.2d 252 (1972). Finally, because appellant attacks the constitutionality of Section 401(3) as construed by the Commonwealth, we are mindful of our duty "to declare a statute constitutional if this can reasonably be done." *Commonwealth v. Girard Life Insurance Co.*, 305 Pa. 558, 566, 158 A. 262, 264 (1932). It is presumed "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." Statutory Construction Act, *supra*, 1 Pa.C.S. §1922(3).

Our analysis begins with subclause 2 because appellant's business is not strictly local. Subclause 2 of the statutory definition contains a general direction to apportion "taxable income" *"as defined in subclause 1. . . ."* (Emphasis supplied.) It is clear, therefore, that the tax base definition in subclause 1 applies to *all* corporations transacting business in Pennsylvania.*

---

*Subclause 3 of Section 401 provides:

"In case the entire business of a corporation which has filed a timely election and has qualified to be taxed as a regulated investment company under the provisions of the Internal Revenue Code of 1954, as amended, is not transacted within this Commonwealth, the tax imposed by this article

Turning to subclause 1, we find that the federal tax deduction for Pennsylvania corporate net income tax is included in "taxable income," but in plain and specific language the subclause provides that the "add-back" *"shall not be apportioned. . . ."* (Emphasis supplied.) For corporations transacting business entirely in Pennsylvania this prohibition against apportionment is idle language. All the "taxable income" of such a corporation is subject to the state tax. *Commonwealth v. Northern Metal Co.*, 416 Pa. 75, 204 A.2d 467 (1964), *cert. denied* 380 U.S. 944 (1965). As President Judge Bowman observed in the opinion of the court below, "The concept of apportionment, for state tax purposes, is meaningless when applied to purely local corporations." *Triumph Hosiery Mills, Inc. v. Commonwealth,* Pa. Commonwealth Ct. , , 343 A.2d 710, 712 (1975). To escape superfluity, then, the prohibition must be construed, if possible, as a specific limitation on the general right to apportion granted in subclause 2 and available to corporations transacting business in Pennsylvania as well as in other states.

We conclude that such a construction is both possible and proper. We hold, pursuant to Sections 401 (3) 1 and 401 (3) 2, that the tax base of a corporation which does not transact its entire business in Pennsylvania must include, without apportionment, the corporation's federal tax deduction for the Pennsylvania corporate net income tax. Our reading of the statute comports with the language and intent of the legislature and lends to it an impact which is unassailable on constitutional grounds.

---

shall be based upon such portion of the taxable income . . . *as defined in subclause 1. . . .*" 72 P.S. §7401(3)3. (Emphasis supplied.)

Apportionment is a necessary incident of the state's taxation of a multistate corporation. As we explained in *Commonwealth v. Rieck Investment Corp.*, supra:

> "It is well settled that state taxation of a foreign corporation's intrastate business activities must proceed along such lines as not to infringe upon the due process, the interstate commerce or equal protection clauses of the Constitution of the United States. State taxation cannot reach income or property derived from business activities conducted by foreign corporations outside the state's border and over which the state has no jurisdiction. To satisfy the constitutional requirements and yet to permit states to tax foreign corporations on a basis which would bear a fair relation to the amount of local business done within their borders, the so-called apportionment or allocation formulas were devised. . . ."

419 Pa. at 57-58, 213 A.2d at 281. Obviously, those elements of a foreign corporation's tax base which are fairly allocable to the taxing state without apportionment need not be apportioned prior to imposition of the tax. The federal tax deduction "add-back" is such an element. It represents only the corporate net income taxes due on the *portion* of "taxable income" related to business activity in *Pennsylvania.* In short, it is but a percentage of Pennsylvania income. Every corporation transacting business in the Commonwealth may be taxed on 100% of this localized element of the tax base. The result is non-discriminatory and uniform, as required by Article VIII, §1, of the Pennsylvania Constitution: "The rate used . . . is the same for all corporations. The tax base to which this

rate is to be applied is also identical. *It is the net income attributable to this State." Turco Paint & Varnish Co. v. Kalodner,* 320 Pa. 421, 426, 184 A. 37, 40 (1936) (emphasis supplied). *See also Columbia Gas Transmission Corp. v. Commonwealth,* Pa. , 360 A.2d 592 (1976).

The Order of the Commonwealth Court is affirmed.

APPENDIX B

STATUTE

ARTICLE IV. CORPORATE NET INCOME TAX
PART I. DEFINITIONS

§7401. Definitions

The following words, terms, and phrases, when used in this article, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

(1) "Corporation." A corporation having capital stock, joint-stock association, or limited partnership either organized under the laws of this Commonwealth, the United States, or any other state, territory, or foreign country, or dependency, and doing business in this Commonwealth, or having capital or property employed or used in this Commonwealth by or in the name of itself, or any person, partnership, association, limited partnership, joint-stock association or corporation. The word "corporation" shall not include building and loan associations, banks, bank and trust companies, national banks, savings institutions, trust companies, insurance and surety companies.

(2) "Department." The Department of Revenue of this Commonwealth.

(3) "Taxable income."

1. In case the entire business of the corporation is transacted within this Commonwealth, for any taxable year which begins on or after January 1, 1971, taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government, or in the case of a corporation participating in the filing of consolidated returns to the Federal Government, the taxable income which would have been returned to and ascertained by the Federal Government if separate returns had been made to the Federal Government for the current and prior taxable years, subject, however, to any correction thereof, for fraud, evasion, or error as finally ascertained by the Federal Government: Provided, That additional deductions shall be allowed from taxable income on account of any dividends received from any other corporation but only to the extent that such dividends are included in taxable income as returned to and ascertained by the Federal Government: Provided further, That taxable income will include the sum of the following tax preference items as defined in section 57 of the Internal Revenue Code, as amended,[1] (i) excess investment interest; (ii) accelerated depreciation on real property; (iii) accelerated depreciation on personal property subject to a net lease; (iv) amortization of certified pollution control facilities; (v) amortization of railroad rolling stock; (vi) stock options; (vii) reserves for losses on bad debts of financial institutions; (viii) depletion; and (ix) capital gains but only to the extent that such preference items are not included in "taxable income" as returned to and ascertained by the Federal Government. No deduction shall be allowed for net operating losses sustained by the corporation during any other fiscal or calendar year. In the case of regulated investment companies as defined by the Internal Revenue Code of 1954, as amended,[2] "taxable income" shall be investment company taxable income as defined in the aforesaid Internal Revenue Code of 1954, as amended. In arriving at "taxable income" for Federal tax purposes for any taxable year beginning on or after January 1, 1971, any corporate net income tax due to the Commonwealth pursuant to the provisions of this article shall not be allowed as a deduction and the amount of corporate net income tax so due and excluded from Federal taxable income under the Internal Revenue Code shall not be apportioned but shall be subject to tax at the rate imposed under this article.

2. In case the entire business of any corporation, other than a corporation engaged in doing business as a regulated investment company as defined by the Internal Revenue Code of 1954, as amended, is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income of such corporation for the fiscal or calendar year, as defined in subclause 1 hereof, and may be determined as follows:

(a) Division of Income

(1) As used in this definition, unless the context otherwise requires:

(A) "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(B) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(C) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employes for personal services.

(D) "Nonbusiness income" means all income other than business income.

(E) "Sales" means all gross receipts of the taxpayer not allocated under this definition other than gross receipts heretofore or hereafter received from the sale, redemption, maturity or exchange of securities, except those held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business.

(F) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(G) "This state" means the Commonwealth of Pennsylvania or, in the case of application of this definition to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed.

(2) Any taxpayer having income from business activity which is taxable both within and without this State other than activity as a corporation whose allocation and apportionment of income is specifically provided for in section 401 (3) 2 (b) (c) and (d) [3] shall allocate and apportion taxable income as provided in this definition.

(3) For purposes of allocation and apportionment of income under this definition, a taxpayer is taxable in another state if in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

(4) Rents and royalties from real or tangible personal property, gains, interest, patent or copyright royalties, to the extent that they constitute nonbusiness income, shall be allocated as provided in paragraphs (5) through (8).

(5) (A) Net rents and royalties from real property located in this State are allocable to this State.

(B) Net rents and royalties from tangible personal property are allocable to this State if and to the extent that the property is utilized in this State, or in their entirety if the taxpayer's commercial domicile is in this State and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(C) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty

period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

(6) (A) Gains and losses from sales or other disposition of real property located in this State are allocable to this State.

(B) Gains and losses from sales or other disposition of tangible personal property are allocable to this State if the property had a situs in this State at the time of the sale, or the taxpayer's commercial domicile is in this State and the taxpayer is not taxable in the state in which the property had a situs.

(C) Gains and losses from sales or other disposition of intangible personal property are allocable to this State if the taxpayer's commercial domicile is in this State.

(7) Interest is allocable to this State if the taxpayer's commercial domicile is in this State.

(8) (A) Patent and copyright royalties are allocable to this State if and to the extent that the patent or copyright is utilized by the payer in this State, or if and to the extent that the patent copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this State.

(B) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation

to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(C) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

(9) All business income shall be apportioned to this State by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.

(10) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this State during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period but shall not include the security interest of any corporation as seller or lessor in personal property sold or leased under a conditional sale, bailment lease, chattel mortgage or other contract providing for the retention of a lien or title as security for the sales price of the property.

(11) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual

rental rate is the annual rental paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals.

(12) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(13) The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

(14) Compensation is paid in this State if:

(A) The individual's service is performed entirely within the State;

(B) The individual's service is performed both within and without the State, but the service performed without the State is incidental to the individual's service within this State; or

(C) Some of the service is performed in this State and the base of operations or if there is no base of operations, the place from which the service is directed or controlled is in this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

(15) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(16) Sales of tangible personal property are in this State if the property is delivered or shipped to a purchaser, within this State regardless of the f.o.b. point or other conditions of the sale.

(17) Sales, other than sales of tangible personal property, are in this State if:

(A) The income-producing activity is performed in this State; or

(B) The income producing activity is performed both in and outside this State and a greater proportion of the income-producing activity is performed in this State than in any other state, based on costs of performance.

(18) If the allocation and apportionment provisions of this definition do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition the Secretary of Revenue or the Secretary of Revenue may require, in respect to all or any part of the taxpayer's business activity:

(A) Separate accounting;

(B) The exclusion of any one or more of the factors;

(C) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(D) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

PART II. IMPOSITION OF TAX

§7402. Imposition of tax

Every corporation shall be subject to, and shall pay for the privilege of doing business in this Commonwealth, or having capital or property employed or used in this Commonwealth, by or in the name of itself, or any person, partnership, association, limited partnership, joint-stock association, or corporation, a State excise tax at the rate of twelve per cent per annum upon each dollar of taxable income of such corporation received by, and accruing to, such corporation during the calender year 1971 and the first six months of 1972 and at the rate of eleven per cent per annum upon each dollar of taxable income of such corporation received by, and accruing to, such corporation during the second six months of calendar year 1972 through the calendar year 1973 and at the rate of nine and one-half per cent per annum upon each dollar of taxable income of such corporation received by, and accruing to, such corporation during the calendar year 1974 and each calendar year thereafter, except where a corporation reports to the Federal Government on the basis of a fiscal year, and has certified such fact to the department as required by section 403 of this article,[1] in which case, such tax, at the rate of twelve per cent, shall be levied, collected, and paid upon all taxable income received by, and accruing to, such corporation during the first six months

of the fiscal year commencing in the calendar year 1972 and at the rate of eleven per cent, shall be levied, collected, and paid upon all taxable income received by, and accruing to, such corporation during the second six months of the fiscal year commencing in the calendar year 1972 and during the fiscal year commencing in the calendar year 1973 and at the rate of nine and one-half per cent, shall be levied, collected, and paid upon all taxable income received by, and accruing to, such corporation during the fiscal year commencing in the calendar year 1974 and during each fiscal year thereafter.

1971, March 4, P.L. 6, No. 2, art. IV, §402. As amended 1971, Aug. 31, P.L. 362, No. 93, §5; 1971, Sept. 9, P.L. 437, No. 105, §3, imd. effective; 1974, March 13, P.L. 179, No. 32, §5, imd. effective.

APPENDIX C

ORDER OF THE SUPREME COURT OF PENNSYLVANIA

SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

No. 66 May Term, 1976

Triumph Hosiery Mills, Inc.,
Appellant

v.

Commonwealth of Pennsylvania

ORDER

AND NOW, this 8th day of October, 1976, it is ordered as follows:

X Order Affirmed

Order Reversed.

Order Vacated and lower court directed to proceed in accordance with opinion filed herewith.

Order Modifed as set forth in opinion filed herewith.

Ordered as set forth in opinion filed herewith.

X Costs to be taxed as provided by Chapter 27 of the Pa. R.A.P.

Costs to be taxed as provided in opinion filed herewith.

By the Court:
J. Haniel Henry
(s) J. Haniel Henry
Deputy Prothonotary

Note: Unless another date is hereinatter set forth, the foregoing order was entered on the docket on the date set forth above.

Order entered: _____

APPENDIX D

NOTICE OF APPEAL

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

No. 1609, C.D. 1973

Triumph Hosiery Mills, Inc.,
Appellant

v.

Commonwealth of Pennsylvania

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Triumph Hosiery Mills, Inc., the above-named Appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Pennsylvania at No. 66 May Term 1976, affirming the judgment for the Commonwealth of Pennsylvania and denying Appellant's claim for relief, entered in this action on October 8, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

(s) HARRY J. RUBIN
HARRY J. RUBIN
KREKSTEIN RUBIN AND
LASDAY
Counsel for Appellant

P. O. Box 799
Harrisburg, PA 17108
(717) 238-8263

Dec 2 2 03 PM '76
Received and Filed
Commonwealth Court
of
Pennsylvania

76-918

In the Supreme Court of the United States

October Term 1976

No. 918

TRIUMPH HOSIERY MILLS, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA,
Appellee

On Appeal From the Supreme Court of Pennsylvania.

MOTION TO DISMISS OR AFFIRM

EUGENE J. ANASTASIO
Deputy Attorney General
R. SCOTT SHEARER
Deputy Attorney General
Counsel for Appellee

405 Finance Bldg.
Harrisburg, Pa. 17120

Murrelle Printing Co., Law Printers, Box 100, Sayre, Pa. 18840

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

QUESTION PRESENTED

Is the add-back of an amount equal to the deduction for the Pennsylvania corporate net income tax taken by the Appellant on its federal income tax return to its otherwise apportioned income violative of the Appellant's constitutional rights under the Commerce and Equal Protection and Due Process Clauses?

SUMMARY OF ARGUMENT

None of the issues raised by Appellant in its Jurisdictional Statement raise a substantial federal question. All of these issues were raised and argued before both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court, and both of these Courts specifically dealt with and disposed of each and every one of these issues. Therefore, Appellant's appeal should be dismissed and the judgment entered by the Pennsylvania Supreme Court affirmed.

STATEMENT OF THE CASE

Appellant is a New York corporation. It holds a certificate of authority to do business in Pennsylvania. During 1971 it actually engaged in business activity in Pennsylvania and was liable for Pennsylvania corporate net income tax, Act of March 4, 1971, P.L. 6, No. 2, §§401 et seq., as amended, 72 P.S. §§7401 et seq.

Appellant duly filed its Pennsylvania corporate net income tax report for 1971. It computed its tax as follows:

Federal taxable income	$ 1,835,771.00
Add: Pennsylvania corporate net income tax	151,281.00
Income to be apportioned	1,987,052.00
Apportionment percentage	.642831
Income apportioned to Pennvania	1,277,338.00
Tax at 12%	$ 153,280.56

In making this computation, Appellant added back to its Federal taxable income the amount of Pennsylvania corporate net income tax which it had taken as a deduction on its Federal income tax return and applied its apportionment percentage to the sum of these two figures in order to arrive at its taxable income for Pennsylvania corporate net income tax purposes.

The Pennsylvania Department of Revenue and Department of the Auditor General were in agreement with

Appellant's Pennsylvania corporate net income tax report except for the way in which Appellant added back the amount of corporate net income tax taken as a deduction on its Federal income tax return. The two taxing departments settled Appellant's corporate net income tax as follows:

Federal taxable income	$ 1,835.771.00
Apportionment percentage	.642831
Income apportioned to Pennsylvania	1,180,090.51
Add: Pennsylvania corporate net income tax	151,281.00
Pennsylvania taxable income	1,331,371.51
Tax at 12%	$ 159,764.58

In making this computation the two taxing departments applied Appellant's apportionment percentage to its Federal taxable income and added the deduction for Pennsylvania corporate net income tax without apportionment, in accordance with the statute, to the result in order to arrive at Appellant's taxable income for Pennsylvania corporate net income tax purposes.

Appellant duly filed a petition for resettlement. The petition was refused. It then filed a petition for review with the Board of Finance and Revenue which was subsequently denied. Appellant duly filed an appeal to the Commonwealth Court of Pennsylvania at No. 1609 Commonwealth Docket 1973. After all facts were stipulated the Commonwealth Court held that the taxing departments were correct in adding back the corporate net income tax after applying Appellant's apportionment percentage to its Federal taxable income. The Commonwealth Court also held that such add-back was not violative of either the Pennsylvania or U. S. Constitutions. The Court's opinion and order nisi was filed on September 5, 1975. The opinion and order are appended hereto as Exhibit A.

Appellant duly filed exceptions to the opinion, conclusions of law and order nisi of the Commonwealth Court. By final order entered January 13, 1976, the Commonwealth Court overruled Appellant's exceptions and entered judgment in accordance with its prior opinion and order nisi. This final order is appended hereto as Exhibit B.

Appellant duly filed an appeal to the Supreme Court of Pennsylvania at No. 66 May Term 1976. After oral argument, the Pennsylvania Supreme Court, in an opinion filed on October 8, 1976, upheld the decision of the Commonwealth Court. This opinion is appended hereto as Exhibit C.

Appellant then filed the instant appeal.

ARGUMENT

Appellant contends that the add-back of an amount equal to the deduction for the Pennsylvania corporate net income tax taken by the Appellant on its federal income tax return to its otherwise apportioned income violates its constitutional rights as guaranteed by the commerce clause (Article I, section 8, clause 3) and the equal protection and due process clauses (14th Amendment, section 1).

Appellant's first argument is that the failure to apportion the "CNI add-back" violates the commerce and due process clauses. The crux of its second argument is that the failure of the Commonwealth to apportion the "CNI add-back" results in some taxpayers' effective CNI tax rate being higher than other taxpayers' effective CNI tax rate. This, Appellant asserts, is a violation of the commerce and equal protection clauses.

In spite of the fact that in the abstract the Commonwealth's method of determining the add-back could exact a greater percentage of tax from a corporation which does a lesser amount of its business in Pennsylvania, the Commonwealth contends that this does not in itself violate the due process or commerce clauses of the Federal Constitution. See *Fox v. Standard Oil Company,* 294 U.S. 87 at page 99 (1935), wherein the Court stated:

> "When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in Magnano Company v. Hamilton, 292 U.S. 40, decided at the last term. 'Even if the tax should destroy a business, it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk.' Alaska Fish Company v. Smith, 255 U.S. 44, at page 48, quoted in Magnano Company v. Hamilton, page 46."

The Court does not have the power to strike down a tax on constitutional grounds simply because the tax burden imposed by the Legislature is heavy. The United States Supreme Court has many times dealt with this problem. See, for example, *Stewart Dry Good Company v. Louis,* 294 U.S. 550 (1935), *Alaska Fish Company v. Smith,* 255 U.S. 44 (1921), and *Magnano Company v. Hamilton,* 292 U.S. 40 (1934).

All of the CNI tax involved in the instant appeal arises because of the taxpayer's connection with Pennsylvania. If there was no connection with Pennsylvania, the taxpayer would not be subject to Pennsylvania CNI at all. Since all of the CNI tax arose because of Appellant's connection with Pennsylvania, there is no basis in logic for requiring the add-back of Pennsylvania CNI to be apportioned. The only rationale for apportionment is to determine a corporation's connections with the taxing jurisdiction and to subject to the taxing jurisdiction's tax that portion of the corporation's net income which it earned from exercising its franchise in Pennsylvania. Since all of the CNI tax was paid to Pennsylvania and since all of it was deducted by the taxpayer in computing his Federal taxable income, it should logically all be added back and taxed by Pennsylvania.

After determining that Sections 401 (3) 1 and 401 (3) 2 require the "CNI add-back" to be added back with-

out apportionment, the Commonwealth Court, in an opinion written by President Judge James S. Bowman, discussed the constitutional arguments raised by Appellant and dismissed them as follows:

> "Anticipating the possibility that this Court might so conclude, appellant also raises a multifaceted constitutional objection to the statute as so construed. Citing the uniformity clause of the Pennsylvania Constitution,[7] and the federal equal protection due process and commerce clauses,[8] appellant contends that a denial of apportionment, even as to only a single component of the statutorily defined tax base, renders the Pennsylvania corporate net income tax constitutionally infirm.
>
> "We need not address each of the four constitutional principles asserted. Within the parameters of this controversy they are collectively directed to the same question: Whether by denying a multistate corporation the right to apportion the 'add-back' of the federal deduction for the Pennsylvania corporate net income tax, do sections 401(3)1 and 401(3)2 create two distinct classes of taxpayers, and thereby discriminate against multistate corporations?
>
> "The purposes of apportionment, on a constitutional level, are to prevent any single state from taxing more than its just share of a multistate corporation's income or property, and to preclude state government partiality towards purely intrastate interests. The proscription against allocation of the federal deduction/'add-back' frustrates neither purpose, and, in fact, affords a buffer against prospective allegations of reverse discrimination.
>
> "The constitutional principles here raised dictate that all components of a particular tax base which are uniquely local in character are properly and constitutionally within the potential ambit of local taxation. In many cases, this 'localism' is predetermined by the situs of the tax base component (e.g. real property taxes) or by the restricted bounds of the taxpayer's domain (e.g. all of the taxpayer's business transacted solely within the taxing state), and resort to more detailed analysis becomes unnecessary. However, in local tax situations involving multistate enterprises, such further analysis often becomes constitutionally and practically imperative and, as in the case of the Pennsylvania corporate net income tax, the formulation of equitable and mathematically sound apportionment formulae is presumed to be the procedure most apt to satisfy this imperative. In other words, the practical goal of apportionment is to localize that which is not local by its very nature and, in so doing, to minimize or eliminate the potential for constitutional deficiency within a particular tax scheme. Where a particular component of a particular tax base has been localized prior to the application of apportionment formulae, apportionment serves no constitutional purpose, and may prove constitutionally debilitating.
>
> "Sections 401(3)1 and 403(3)2 require that the federal deduction for only the *Pennsylvania* corporate net income tax be returned to the base figure

[7] Pa. Const. art. VIII, §1.

[8] U.S. Const. amend. XIV, §1 (equal protection and due process) and U.S. Const. art. I, §8, cl. 3 (commerce).

of federal taxable income in computing the taxable income for application of the Pennsylvania tax. Thus, this particular component has been localized prior to the application of the appropriate apportionment formulae. Apportionment has occurred in the first instance, that is, at the time when the multistate corporate taxpayer determines what portion of its *total* federal deduction for state taxes represents the *Pennsylvania* corporate net income tax. Further apportionment of this particular component of the tax base would be nugatory under the mandates of both the Pennsylvania and Federal Constitutions, and would likely have negative repercussions. Local corporations, who are expressly required to include 100% of their federal deductions for the Pennsylvania corporate net income tax within the tax base, could identify a 'double apportionment' so afforded multistate corporations as a clear violation of the very same constitutional provisions (excepting the commerce clause) here propounded by appellant.

"In conclusion, the failure of the Pennsylvania corporate net income tax to provide for the apportionment of the federal deduction for said tax is not violative of either the Pennsylvania or Federal Constitutions. On the contrary, this proscription guarantees equality of treatment to both local and multistate corporations subject to the tax." 21 Pa. Commonwealth Ct. 186, 190-193, 343 A.2d 710, 713-714 (1975).

The Pennsylvania Supreme Court affirmed the decision of the Commonwealth Court. In its opinion, written by Chief Justice Benjamin R. Jones, the Pennsylvania Supreme Court stated:

". . . Our reading of the statute comports with the language and intent of the legislature and lends to it an impact which is unassailable on constitutional grounds.

"Apportionment is a necessary incident of the state's taxation of a multistate corporation. As we explained in *Commonwealth v. Rieck Investment Corp.*, supra:

" 'It is well settled that state taxation of a foreign corporation's intrastate business activities must proceed along such lines as not to infringe upon the due process, the interstate commerce or equal protection clauses of the Constitution of the United States. State taxation cannot reach income or property derived from business activities conducted by foreign corporations outside the state's border and over which the state has no jurisdiction. To satisfy the constitutional requirements and yet to permit states to tax foreign corporations on a basis which would bear a fair relation to the amount of local business done within their borders, the so-called apportionment or allocation formulas were devised. . .' 419 Pa. at 57-58, 213 A.2d at 281. Obviously, those elements of a foreign corporation's tax base which are fairly allocable to the taxing state without apportionment need not be apportioned prior to imposition of the tax. The federal tax deduction 'add-back' is such an element. It represents only the corporate net income taxes due on the *portion* of 'taxable income' related to business activity in *Pennsylvania.* In short, it is but a percentage of Pennsylvania income. Every corporation transacting business in the Commonwealth may be taxed on 100%

> of this localized element of the tax base. The result is non-discriminatory and uniform, as required by Article VIII, §1, of the Pennsylvania Constitution: 'The rate used . . . is the same for all corporations. The tax base to which this rate is to be applied is also identical. *It is the net income attributable to this State.' Turco Paint & Varnish Co. v. Kalodner,* 320 Pa. 421, 426, 184 A. 34, 40 (1936) (emphasis supplied). . . .'" Pa. , 364 A.2d 919, 922 (1976).

There were several amici curiae briefs submitted before both the Commonwealth Court and Pennsylvania Supreme Court. In addition, there were several amici curiae oral arguments before the Pennsylvania Supreme Court. All of the briefs and oral arguments adequately raised the constitutional issues involved and both Courts were well aware of the issues.

As the Pennsylvania Commonwealth Court pointed out in its opinion, if this add-back were to be apportioned, as Appellant is requesting, such treatment would result in the "clear violation" of both the Pennsylvania and United States Constitutions.

CONCLUSION

In effect, Appellant's Jurisdictional Statement does not raise any substantial Federal questions which were not already considered and disposed of by the Commonwealth and Supreme Courts of Pennsylvania. Hence, the Commonwealth submits that the appeal of the Appellant should be dismissed and the judgment of the Pennsylvania Supreme Court be affirmed.

Respectfully submitted,

EUGENE J. ANASTASIO
Deputy Attorney General
R. SCOTT SHEARER
Deputy Attorney General
Counsel for Appellee

EXHIBIT A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1609 C. D. 1973

Triumph Hosiery Mills, Inc.,
Appellant

v.

Commonwealth of Pennsylvania,
Appellee

Before:

Honorable James S. Bowman, President
Honorable James C. Crumlish, Jr., Judge
Honorable Harry A. Kramer, Judge
Honorable Roy Wilkinson, Jr., Judge
Honorable Glenn E. Mencer, Judge
Honorable Theodore O. Rogers, Judge
Honorable Genevieve Blatt, Judge
Argued: June 5, 1975

Opinion by President Judge Bowman filed September 5, 1975:

Triumph Hosiery Mills, Inc. (appellant) is a New York corporation which transacts a part of its business in

Pennsylvania. By exercising its privilege to engage in business within this state, appellant is necessarily subject to the imposition of the Pennsylvania corporate net income tax.[1]

Subsequent to appellant's filing of its Pennsylvania corporate net income tax return for the year ending December 31, 1971, the Department of Revenue disagreed with the method employed by appellant in the computation of its tax liability, and settled the tax due to a higher amount. This action precipitated administrative review procedures culminating in the rejection of appellant's contention.[2] Hence this appeal. It is before us on stipulated facts which we adopt in this de novo appeal.

The Pennsylvania corporate net income tax is measured upon a tax base of "taxable income" which is defined in limine as the "taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government . . . ."[3] There follow several provisos which are not germane to this controversy. The last sentence of section 401 (3) 1 is one of two statutory focal points of the parties' dispute.

> "In arriving at 'taxable income' for Federal tax purposes . . . any corporate net income tax due to the Commonwealth pursuant to the provisions of this article shall not be allowed as a deduction and

[1] Article IV of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, *as amended*, 72 P.S. §7401 et seq., henceforth referred to as Code.

[2] The procedures for settlement, resettlement and review are set forth in section 407 of the Code, *as amended*, 72 P.S. §7407.

[3] Section 401(3)1 of the Code, *as amended*, 72 P.S. §7401-(3)1.

> the amount of corporate net income tax so due and excluded from Federal taxable income under the Internal Revenue Code shall not be apportioned but *shall be subject to tax at the rate imposed under this article.*" (Emphasis added.)

Initially, this provision requires taxpayers to "add-back", to their federal taxable incomes, the deductions taken on their federal returns for the Pennsylvania corporate net income tax.[4] Appellant disputes neither the clear meaning of this "add-back" requirement, nor its validity under constitutional principles. Rather, the parties disagree as to the appropriate time at which the federal deduction should be "added back" in computing the Pennsylvania tax base.

It cannot be gainsaid that the proscription against apportionment of the "add-back" is glaringly inappropriate within the context of section 401(3)1, since that subsection, by its own terms of introduction, refers only to corporations whose *entire* business is transacted in Pennsylvania. The concept of apportionment, for state tax purposes, is meaningless when applied to purely local corporations. In fact, appellant contends that, in view of its placement, the proscription against apportionment is so meaningless that we should simply deem it a legislative aberration, and ignore its existence. Appellant buttresses this contention by reference to the second statutory focal

[4] This perhaps resounds in confusion but, presumably, in computing their federal deductions for state taxes, corporate taxpayers approximate their potential liabilities for the Pennsylvania corporate net income tax. Then, to determine their actual liabilities for the Pennsylvania tax, section 401(3)1 requires the taxpayers to return this approximation to the tax base.

point of the parties' dispute, the language of section 401-(3)2:

> "In case the entire business of any corporation . . . is not transacted within this Commonwealth, the tax imposed by this article shall be based upon *such portion of the taxable income of such corporation . . . as defined in subclause 1 hereof . . . .*"[5] (Emphasis added.)

Appellant argues that *because* section 401(3)2 defines the "taxable income" of multistate corporations in terms of "such portion of the taxable income . . . as defined in subclause 1 [section 401(3)1]", and that *because* the "add-back" of the federal deduction for the Pennsylvania corporate net income tax is an integral part of the subclause 1 definition of "taxable income", that, *therefore*, said "add-back", as well as the other components of the subclause 1 definition, must be apportioned in computing appellant's Pennsylvania taxable income. We agree with appellant's premises, but not with its conclusion.

Despite its (mis-)placement in section 401(3)1, we feel that the proscription against apportionment of the federal deduction/"add-back" cannot be disregarded in deference to appellant's perception of the "clear intent" of section 401(3)2. Rather, when read in conjunction with subclause 2 (section 401(3)2), the proscription against apportionment leads us to the opposite conclusion. We agree that the "add-back" of the federal deduction for the Pennsylvania corporate net income tax does be-

[5] 72 P.S. §7401(3)2. The remainder of section 401 delineates the factors to be utilized in determining the proper portion of the taxable income of a multistate corporation to be allocated to Pennsylvania.

come incorporated into subclause 2 by the latter's reference to "taxable income . . . as defined in subclause 1", but we cannot, as appellant has so conveniently done, terminate our analysis at that point. The proscription against apportionment is *also* an integral part of the subclause 1 definition of "taxable income", and must *also* be incorporated by reference into subclause 2. Thus, while subclause 2 provides a *general* license to a multistate corporation to apportion its "taxable income . . . as defined in subclause 1", that same definition of "taxable income" contains a *specific* prohibition against the apportionment of one component of said taxable income, namely, the "add-back" of the federal deduction of the Pennsylvania corporate net income tax. Even assuming that the two subclauses produce an irreconcilable conflict in their directions, the specific prohibition against apportionment must prevail over the general license to apportion.[6]

Therefore, we adopt the Commonwealth's interpretation of sections 401(3)1 and 401(3)2. When computing its tax base for purposes of the Pennsylvania corporate net income tax, a corporation whose entire business is *not* transacted in Pennsylvania may apportion its taxable income except insofar as said taxable income represents the "add-back" of that corporation's federal tax deduction for the Pennsylvania corporate net income tax.

Anticipating the possibility that this Court might so conclude, appellant also raises a multifaceted constitutional objection to the statute as so construed. Citing the

[6] Section 1933 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1933.

uniformity clause of the Pennsylvania Constitution,[7] and the federal equal protection, due process and commerce clauses,[8] appellant contends that a denial of apportionment, even as to only a single component of the statutorily defined tax base, renders the Pennsylvania corporate net income tax constitutionally infirm.

We need not address each of the four constitutional principles asserted. Within the parameters of this controversy they are collectively directed to the same question: Whether by denying a multistate corporation the right to apportion the "add-back" of the federal deduction for the Pennsylvania corporate net income tax, do sections 401(3)1 and 401(3)2 create two distinct classes of taxpayers, and thereby discriminate against multistate corporations?

The purposes of apportionment, on a constitutional level, are to prevent any single state from taxing more than its just share of a multistate corporation's income or property, and to preclude state government partiality towards purely intrastate interests. The proscription against allocation of the federal deduction/"add-back" frustrates neither purpose, and, in fact, affords a buffer against prospective allegations of reverse discrimination.

The constitutional principles here raised dictate that all components of a particular tax base which are uniquely local in character are properly and constitutionally within the potential ambit of local taxation. In many cases, this "localism" is predetermined by the situs of the tax

[7] Pa. Const. art. VIII, §1.

[8] U.S. Const. amend. XIV, §1 (equal protection and due process) and U.S. Const. art. I, §8, cl. 3 (commerce).

base component (e.g. real property taxes) or by the restricted bounds of the taxpayer's domain (e.g. all of the taxpayer's business transacted solely within the taxing state), and resort to more detailed analysis becomes unnecessary. However, in local tax situations involving multistate enterprises, such further analysis often becomes constitutionally and practically imperative and, as in the case of the Pennsylvania corporate net income tax, the formulation of equitable and mathematically sound apportionment formulae is presumed to be the procedure most apt to satisfy this imperative. In other words, the practical goal of apportionment is to localize that which is not local by its very nature and, in so doing, to minimize or eliminate the potential for constitutional deficiency within a particular tax scheme. Where a particular component of a particular tax base has been localized prior to the application of apportionment formulae, apportionment serves no constitutional purpose, and may prove constitutionally debilitating.

Sections 401 (3) 1 and 403 (3) 2 require that the federal deduction for only the *Pennsylvania* corporate net income tax be returned to the base figure of federal taxable income in computing the taxable income for application of the Pennsylvania tax. Thus, this particular component has been localized prior to the application of the appropriate apportionment formulae. Apportionment has occurred in the first instance, that is, at the time when the multistate corporate taxpayer determines what portion of its *total* federal deduction for state taxes represents the *Pennsylvania* corporate net income tax. Further apportionment of this particular component of the tax base would be nugatory under the mandates of both the Pennsylvania and Federal Constitutions, and would likely have

negative repercussions. Local corporations, who are expressly required to include 100% of their federal deductions for the Pennsylvania corporate net income tax within the tax base, could identify a "double apportionment" so afforded multistate corporations as a clear violation of the very same constitutional provisions (excepting the commerce clause) here propounded by appellant.

In conclusion, the failure of the Pennsylvania corporate net income tax to provide for the apportionment of the federal deduction for said tax is not violative of either the Pennsylvania or Federal Constitutions. On the contrary, this proscription guarantees equality of treatment to both local and multistate corporations subject to the tax.

Accordingly, we enter the following

ORDER

NOW, September 5, 1975, unless exceptions are filed hereto within thirty (30) days, the Chief Clerk is hereby directed to enter judgment against Triumph Hosiery Mills, Inc. and in favor of the Commonwealth, in the amount of $159,764.58. The Chief Clerk is further directed to mark said judgment "satisfied" inasmuch as the full amount of said judgment has been paid by Triumph Hosiery Mills, Inc.

(s) James S. Bowman
James S. Bowman,
President Judge

EXHIBIT B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1609 Commonwealth Docket 1973

Triumph Hosiery Mills, Inc.,
Appellant

v.

Commonwealth of Pennsylvania,
Appellee

FINAL ORDER

AND NOW, January 13, 1976, the Exceptions of the Appellant, Triumph Hosiery Mills, Inc., are overruled. Final judgment is entered in favor of the Commonwealth of Pennsylvania and against Triumph Hosiery Mills, Inc. in the amount of $159,764.58. Since Appellant has paid all of said amount, the Prothonotary is directed to mark said Judgment satisfied upon payment by Appellant of the Prothonotary's costs.

(s) James S. Bowman *P. J.*

EXHIBIT C

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

No. 66 May Term, 1976

Triumph Hosiery Mills, Inc.,
Appellant

v.

Commonwealth of Pennsylvania

Appeal from Order of Commonwealth Court at No. 1609 C. D. 1973

Entered: January 13, 1976

OPINION

JONES, C. J. Filed: October 8, 1976:

The Pennsylvania corporate net income tax, Act of March 4, 1971, P.L. 74, No. 2, art IV, §401 *et seq., as amended,* 72 P.S. §7401 *et seq.,* is imposed on corporations transacting business within the Commonwealth. It is levied for the privilege of doing business in Pennsylvania. *Turco Paint & Varnish Co. v. Kalodner,* 320 Pa.

421, 184 A. 37 (1936). The tax base, called "taxable income," for computation of the tax is, essentially, federal taxable income to which the taxpayer "adds-back" any deduction for the Pennsylvania corporate net income tax taken on the federal return. Section 401 (3) 1 of the Act, *supra*, 72 P.S. §7401 (3) 1. Corporations transacting their entire business in the Commonwealth apply the tax rate to all their "taxable income," while those which are not purely local are taxed on only the portion of "taxable income" attributable to the state. This latter figure is determined through application of an apportionment percentage. Section 401 (3) 1, 2, *supra*, 72 P.S. §7401 (3)-1, 2. In this appeal we are asked to decide whether a corporation whose entire business is not transacted in Pennsylvania may apportion that part of its tax base which represents the corporation's federal tax deduction for the Pennsylvania corporate net income tax.

The appeal is before us on an agreed stipulation of facts. Appellant, Triumph Hosiery Mills, Inc., is a New York corporation authorized to do business in Pennsylvania. During 1971 it engaged in business activity in Pennsylvania and was liable for Pennsylvania corporate net income tax. In its tax report for that year, appellant arrived at its tax base by adding to federal taxable income the amount of Pennsylvania corporate net income tax deducted on its federal income tax return. Appellant then apportioned the sum of these two items.

This computation was disputed by the Pennsylvania Department of Revenue and Department of the Auditor General. The two departments first applied appellant's apportionment percentage to federal taxable income. Then, the whole deduction for Pennsylvania corporate net income tax was "added-back" in order to arrive at "taxable income." The method employed by the Commonwealth yielded $6,484.02 more in taxes.

Thereafter, appellant filed a Petition for Resettlement which was refused. It then filed a Petition for Review with the Board of Finance and Revenue which was also refused, two members of the Board dissenting. On appeal to the Commonwealth Court appellant was again denied relief. This appeal followed.

Section 401 (3) of the taxing statute provides:

" 'Taxable income.'

1. In case the entire business of the corporation is transacted within this Commonwealth, for any taxable year which begins on or after January 1, 1971, taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government. . . . In arriving at 'taxable income' for Federal tax purposes for any taxable year beginning on or after January 1, 1971, any corporate net income tax due to the Commonwealth pursuant to the provisions of this article shall not be allowed as a deduction and the amount of corporate net income tax so due and excluded from Federal taxable income under Internal Revenue Code *shall not be apportioned* but shall be subject to tax at the rate imposed under this article.

2. In case the entire business of any corporation . . . is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income of such corporation for the fiscal or calendar year, *as defined in subclause 1 hereof*. . . ." (Emphasis supplied.)

This statute, like every enactment of the legislature, must be analyzed in accordance with the established rules of statutory construction. Particularly pertinent to the determination at hand is the principle "that a taxing statute must be strictly construed and any doubt or uncertainty as to the imposition of a tax must be resolved in favor of the taxpayer." *Commonwealth v. Rieck Investment Corp.*, 419 Pa. 52, 59, 213 A.2d 277, 281-82 (1965); Statutory Construction Act of November 25, 1970, P.L. 707, added December 6, 1972, P.L. 1339, §3, 1 Pa. C. S. §1928(b)(3). Of equal importance is the presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." Statutory Construction Act, *supra*, 1 Pa. C. S. §1922(1). All the language of a statute must be given effect. "The Legislature cannot be deemed to intend that its language be superfluous and without import." *Daly v. Hemphill*, 411 Pa. 263, 273, 191 A.2d 835, 842 (1963). Additionally, it is mandatory, where possible, that we construe conflicting general and special provisions of a statute so that both may be given effect. Statutory Construction Act, *supra*, 1 Pa. C. S. §1933; *Appeal of Yerger*, Pa. , 333 A.2d 902 (1975); *Duquesne Light Co. v. Borough of Monroeville*, 449 Pa. 573, 298 A.2d 252 (1972). Finally, because appellant attacks the constitutionality of Section 401(3) as construed by the Commonwealth, we are mindful of our duty "to declare a statute constitutional if this can reasonably be done." *Commonwealth v. Girard Life Insurance Co.*, 305 Pa. 558, 566, 158 A. 262, 264 (1932). It is presumed "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." Statutory Construction Act, *supra*, 1 Pa. C. S. §1922(3).

Our analysis begins with subclause 2 because appellant's business is not strictly local. Subclause 2 of the statutory definition contains a general direction to apportion "taxable income" *"as defined in subclause 1. . . ."* (Emphasis supplied.) It is clear, therefore, that the tax base definition in subclause 1 applies to *all* corporations transacting business in Pennsylvania.*

Turning to subclause 1, we find that the federal tax deduction for Pennsylvania corporate net income tax is included in "taxable income," but in plain and specific language the subclause provides that the "add-back" *"shall not be apportioned. . . ."* (Emphasis supplied.) For corporations transacting business entirely in Pennsylvania this prohibition against apportionment is idle language. All the "taxable income" of such a corporation is subject to the state tax. *Commonwealth v. Northern Metal Co.*, 416 Pa. 75, 204 A.2d 467 (1964), *cert. denied*, 380 U.S. 944 (1965). As President Judge Bowman observed in the opinion of the court below, "The concept of apportionment, for state tax purposes, is meaningless when applied to purely local corporations." *Triumph Hosiery Mills, Inc. v. Commonwealth*, Pa. Commonwealth Ct. , , 343 A.2d 710, 712 (1975). To escape superfluity, then, the prohibition must be con-

*Subclause 3 of Section 401 provides:

"In case the entire business of a corporation which has filed a timely election and has qualified to be taxed as a regulated investment company under the provisions of the Internal Revenue Code of 1954, as amended, is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income . . . *as defined in subclause* 1. . . ." 72 P.S. §7401(3)3. (Emphasis supplied.)

strued, if possible, as a specific limitation on the general right to apportion granted in subclause 2 and available to corporations transacting business in Pennsylvania as well as in other states.

We conclude that such a construction is both possible and proper. We hold, pursuant to Sections 401 (3)-1 and 401 (3) 2, that the tax base of a corporation which does not transact its entire business in Pennsylvania must include, without apportionment, the corporation's federal tax deduction for the Pennsylvania corporate net income tax. Our reading of the statute comports with the language and intent of the legislature and lends to it an impact which is unassailable on constitutional grounds.

Apportionment is a necessary incident of the state's taxation of a multistate corporation. As we explained in *Commonwealth v. Rieck Investment Corp., supra:*

> "It is well settled that state taxation of a foreign corporation's intrastate business activities must proceed along such lines as not to infringe upon the due process, the interstate commerce or equal protection clauses of the Constitution of the United States. State taxation cannot reach income or property derived from business activities conducted by foreign corporations outside the states's border and over which the state has no jurisdiction. To satisfy the constitutional requirements and yet to permit states to tax foreign corporations on a basis which would bear a fair relation to the amount of local business done within their borders, the so-called apportionment or allocation formulas were devised. . . ."

419 Pa. at 57-58, 213 A.2d at 281. Obviously, those elements of a foreign corporation's tax base which are fairly

allocable to the taxing state without apportionment need not be apportioned prior to imposition of the tax. The federal tax deduction "add-back" is such an element. It represents only the corporate net income taxes due on the *portion* of "taxable income" related to business activity in *Pennsylvania.* In short, it is but a percentage of Pennsylvania income. Every corporation transacting business in the Commonwealth may be taxed on 100% of this localized element of the tax base. The result is non-discriminatory and uniform, as required by Article VIII, §1, of the Pennsylvania Constitution: "The rate used . . . is the same for all corporations. The tax base to which this rate is to be applied is also identical. *It is the net income attributable to this State." Turco Paint & Varnish Co. v. Kalodner,* 320 Pa. 421, 426, 184 A. 37, 40 (1936) (emphasis supplied). *See also Columbia Gas Transmission Corp. v. Commonwealth,* Pa. , 360 A.2d 592 (1976).

The Order of the Commonwealth Court is affirmed.